

## APPEAL NO. 93431

On April 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue to be determined at the hearing was whether the claimant, Ms H, the mother of the deceased worker, HH, was eligible for death benefits as the surviving dependent parent. The hearing officer determined that she had not proven dependency as required by the rules of the Texas Workers' Compensation Commission (Commission), Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2). The deceased died while acting in the course and scope of employment for the City, on January 22, 1992.

The claimant has appealed, arguing that her uncorroborated evidence proves that she received substantial support from her deceased son, and that it amounted to 30% of her gross income. The carrier argues that claimant's evidence was not specific enough to demonstrate dependency under Rule 132.2.

## DECISION

The decision of the hearing officer is affirmed.

Claimant, the deceased worker's mother, stated that her son lived with her and two daughters in (state) during 1989, at which time her husband moved out. Her son worked three jobs to contribute to the family finances. Later in 1989, he moved to (city). In the fall of 1990, claimant stated she moved to (city). Claimant stated that she could not have made it financially right after her husband left were it not for her son. She stated she had just had back surgery and was only able to work part-time. The claimant stated that her son continued to "help out" with purchases of clothing, groceries, utilities, and plane tickets to fly her to Dallas after she moved to (city). He also assisted with payment of his sister's college tuition and books. Claimant also said he did all the oil changes for her car. However, the frequency, amounts, and times of such various payments were not detailed.

Claimant said that there were no cancelled checks among her son's belongings because he used "carbon" checks. Although her son gave her cash and money orders, she said that most of the time she was paid by check. She said she had not requested copies of her son's checks from his bank. Claimant stated she did not personally have documents to prove her opinion that the deceased worker contributed at least 30% to her household during 1989, 1990, and 1991. Whether this was 30% of her expenses, 30% of her gross household income, or 30% of her net household income was not established by the evidence.

Claimant testified that she was the beneficiary on her son's life insurance policies and that her son was not married and had no children at the time of his death. She stated that her son did not claim her as a dependent on his federal income tax returns. Claimant stated that for a time (again, not specified), the deceased allowed his mother to use his credit cards. There is no indication in the testimony as to whether the deceased's college

age sister may have contributed to the household income.

The only evidence in the record of specific amounts of money are as follows. The claimant testified about the gross amounts of salary (and alimony) she was paid in the three years prior to her son's death, when she worked as a licensed vocational nurse. These were \$15,889 (1989), \$14,783 (1990), and \$31,563, which included \$6,000 alimony (1991). The record does not indicate the proportion the deceased's contributions bore to these amounts. The decedent's average weekly wage was asserted to be \$534.98. The claimant testified that her son gave her \$500 in 1990 as a down payment for a car, that he paid \$50 per month on the car payment for his sister's car (for a time period whose duration was not specified although payments were made during 1990), that in 1991 her son took out a loan for \$300 for her to use toward various credit card bills. The claimant testified that she was also given \$150 shortly before his death towards the cost of a plane ticket to visit an injured daughter in (state). When asked in cross examination how she derived the 30% figure, the claimant testified about the method she used (adding up what claimant had contributed). Unfortunately, no specific amounts were described, nor did the carrier's attorney press for any specific information. Claimant testified that she would say that claimant gave her money every month, but the amounts varied.

The claimant's daughter, Patsy Long, testified that she would agree with her mother's answers if she were asked the same questions. She agreed that based upon her personal knowledge, derived from handling her mother's finances, that her brother's contribution was at least 30%. She did not detail specific amounts or the basis for this calculation.

The carrier requested in interrogatories that claimant supply her income tax returns and those of her son for the years 1990 and 1991. Claimant's attorney admitted they had not been produced, noting that claimant was having a difficult time with her son's death. Claimant offered no documentary evidence whatsoever.

Under the changes made to the death benefits provisions of the law by the 1989 Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.42(e) (Vernon Supp. 1993) (1989 Act), a parent who wishes to claim death benefits must prove dependency upon the deceased worker. Rule 132.2 was promulgated by the Commission to describe what would be considered as dependency, and it sets forth requirements of evidence that would have to be met. A claimant has the burden of proving that economic benefits paid by a deceased worker which were less than monthly on an established basis were regular or recurring. Rule 132.2(b). The only regular, recurring, specific amounts testified about were car payments made on behalf of the deceased worker's sister Robin, not the claimant, although the duration of such payments was not specified.

Both parties note in their appeals the fact that Rule 132.2 outlines a measure by which a trier of fact may assess dependency, in reference to whether an economic benefit

represents a "substantial" contribution. The measure noted in Rule 132.2(c) is 20% of the claimant's net resources. However, evidence of this percentage establishes a presumption, not a minimum threshold, of economic dependency. It is possible for a claimant to demonstrate dependency at a lesser percentage; however, Rule 132.2(c) makes clear that: "The burden is on the claimant to prove that benefits whose value was less than 20% of the person's net resources contributed significantly to the person's welfare and livelihood." Rule 132.2(e) states:

The person claiming to be a dependent shall furnish sufficient information to enable the commission to accurately identify the net resources and to establish the existence of the economic benefit claimed. This information may include, but is not limited to, tax returns, a financial statement of the individual, and check stubs.

Also, Rule 132.7(a) requires that the state of dependency exist as of the date of death.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and the weight and credibility to be given to the evidence. Art. 8308-6.34(e). The testimony of a claimant raises only a fact issue, and the hearing officer may give credence to all, part, or none of the testimony offered. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). While he may have believed that she was in bad financial straits in 1989, the hearing officer might also have believed that the deceased's contribution went down in 1991 as claimant's income rose substantially from prior years. It is important here to emphasize that an assessment of credibility of evidence goes not necessarily to truthfulness, but to the accuracy of the recollection. It would not be inconsistent for the hearing officer to believe in claimant's sincerity, but to also believe that a retrospective recollection about finances is inaccurate when it does not appear to be based upon concrete figures.

We understand that a claimant may not always have records in his or her possession to account for expenditures made by another person. Nevertheless, the testimony should itself provide "information to enable the commission to accurately identify" facts to establish dependency. Here, the hearing officer evidently was not satisfied that evidence established the 20% presumption or furnished enough information upon which to base other findings in claimant's favor. We cannot say that his findings are so against the great weight and preponderance of the evidence in this case as to be manifestly unjust. The benefit review conference report noted the lack of specific information. The carrier sought more specific information in interrogatories that were not answered. The claimant appears to have been represented by counsel throughout the dispute resolution process.

Given the evidence in this case, the decision of the hearing officer is supportable. See Texas Workers' Compensation Commission Appeal No. 92107, decided May 4, 1992;

Appeal No. 92721, decided February 18, 1993.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge